IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 5, 2008

STATE OF TENNESSEE v. LLOYD MONTGOMERY

Appeal from the Circuit Court for Montgomery County
Nos. 40200207 and 40500167 John H. Gasaway, III, Judge

No. M2007-00489-CCA-R3-CD - Filed March 12, 2008

The Defendant, Lloyd Montgomery, appeals the judgment of the Montgomery County Circuit Court revoking his community corrections sentence and imposing confinement. The Defendant twice pled guilty to possession of less than .5 grams of cocaine and, consequently, he was placed in the Community Corrections Program. He was subsequently arrested on new drug charges, and a violation warrant was issued. The trial court ultimately suppressed the evidence underlying the new charges but revoked the Defendant's community corrections sentence, concluding by a preponderance of the evidence that the Defendant illegally possessed drugs in violation of the conditions of his community corrections sentence. The Defendant appeals the revocation of his sentence, arguing that there was no evidence presented at the motion to suppress hearing to support the trial court's finding that he possessed illegal drugs. The State concedes error on the merits of the issue. The trial court's order of revocation is reversed, and the case is remanded for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; Remanded

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Roger E. Nell, District Public Defender; and Collier W. Goodlett, Assistant District Public Defender, for the appellant, Lloyd Montgomery.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; John W. Carney, District Attorney General; and Art Bieber, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

We begin by pointing out that the record on appeal is sparse. Copies of the judgment forms are not included in the record. We must glean the following information regarding the Defendant's convictions from notations on the front of the "technical record." On August 14, 2003, the Defendant pled guilty, in Case No. 40200207, to possession of less than .5 grams of cocaine, a Class C felony; See Tenn. Code Ann. § 39-17-417(a)(3), (c)(2). He received a sentence of three years; manner of service is noted as "three years state probation, 1 year split out to serve, consecutive to parole violation."

On January 31, 2006, he again pled guilty to possession of less than .5 grams of cocaine in Case No. 40500167. He received a six-year sentence to be served in the Community Corrections Program. Also on January 31, the trial court determined that he had violated the terms of his August 2003, probationary sentence and, according to the technical record notation, he was then "reinstated to probation and transferred to Community Corrections."

A violation warrant was issued in both cases on May 24, 2006, wherein it was alleged that the Defendant had violated the conditions of his community corrections sentence by: "A. Violation of Court Sentencing Order Rule #6, and 9. B. Violation of Behavioral Contract Condition #9."[1] The warrant further informed: "A. Defendant did on or about May 18, 2006, have himself arrested for Possession of Schedule II controlled substance, in and around Montgomery County, Tennessee. B. Defendant has failed to remain arrest free, new arrest on May 18, 2006."

Following the Defendant's May 2006 arrest, he was indicted for new drug charges in Case No. 40600792. He filed a motion to suppress the evidence in that case, and a hearing was held on February 8, 2007. Officer Eric Love of the Clarksville Police Department provided testimony regarding the events leading to the Defendant's arrest on May 18, 2006.

Officer Love testified that, on the evening of May 18, he observed two individuals exit a sport utility vehicle stopped on the side of the road, arousing his suspicions. He began to follow the vehicle. The vehicle made several turns, and Officer Love believed "they were circling back to pickup the people that were dropped off at the bridge." After the driver made several turns without using a turn signal, Officer Love initiated a traffic stop and called for backup.

Once stopped, Officer Love approached the driver of the vehicle (the Defendant) and told him that he was being pulled over for failing to use his turn signal. Another male was in the back seat of the vehicle. The Defendant produced a driver's license, a bill of sale for the vehicle, and proof of insurance. Officer Love returned to his vehicle and checked the Defendant's

[1] Neither the sentencing order nor the behavioral contract are included in the record on appeal.

documentation, which appeared to be valid. About the time Officer Love concluded that the documents were valid, the backup officer, Officer Robarge,[2] arrived.

Officer Love again went to question the Defendant, and Officer Robarge stood on the passenger's side of the vehicle. According to Officer Love, the questions he then began to pose to the Defendant became "harder." Officer Love asked the Defendant about the individuals he dropped off at the bridge. Officer Love also saw a purse in the vehicle and inquired of the Defendant to whom it belonged.

Officer Love stated that he thereafter arrested the Defendant "[b]ecause of the amount of white powder substance that was found in the back seat, or rock substance basically." Officer Love informed that he did not personally observe the substance but that it was seen by Officer Robarge in plain view. After this observation, Officer Robarge instructed Officer Love to get the Defendant out of the vehicle, and the Defendant was taken into custody.

Upon a search of the Defendant's car, Officer Love discovered "pills . . . in a cellophane wrapper like used for cigarette packs." Officer Love did not issue the Defendant a citation for failing to use a turn signal. Officer Love opined that it took five to ten minutes to verify the Defendant's documents and that, following document verification, questioning continued approximately ten more minutes before the Defendant was arrested.

Defense counsel began to cross-examine Officer Love. At this point in the hearing, the trial court stopped further questioning of the witness, stating that there was "no need" for defense counsel to question the witness because the motion to suppress was meritorious. No further proof was presented. The trial court concluded that the length of the traffic stop ran beyond a reasonable time necessary to carry out the purpose of the stop.

The trial court then concluded that the proof showed that the Defendant violated his community corrections sentence, reasoning as follows:

> [B]ut illegal or not the fact remains that by a preponderance of the evidence there's no doubt—I say there's no doubt, the evidence preponderates in favor of the contention th[at] he is in violation of probation by being in possession of cocaine whether it's constructive or actual. And even though the officer is not going to be able to go forward on this charge because of the [c]ourt's ruling he's in violation of his community correction[s] sentence for having that cocaine on him whether it's legally obtained or not.
>
> So the [c]ourt grants your motion; the evidence is suppressed, but finds that [the Defendant] is in violation of community correction[s]. You can step down,

[2] Officer Love did not use Officer Robarge's first name, and it does not appear anywhere in the record.

> [o]fficer. And if you want to put on some evidence about disposition now would be the time to do it.

In response to this ruling, defense counsel stated that he was only prepared for the motion to suppress hearing and not a determination regarding revocation of the Defendant's sentence. The trial court responded, "Well, I'm sorry; we're going to go forward on the violation. . . . If you want to offer some disposition I'll be glad to hear it, because the [c]ourt finds that he did violate by being in possession of cocaine however it was discovered."

The Defendant chose not to testify, and neither side presented any argument regarding revocation. The trial court then made the following remarks to conclude the hearing:

> Very Well. Given the history that [the Defendant] has of being placed on a release status on repeated occasions, and given the fact that he was on a release status for drug possession and he was in again possession of drugs this night the [c]ourt finds that the appropriate disposition would be to remand him to the Department of Correction to serve out the balance of these two sentences . . . .

An order of revocation was entered on February 8, 2007. It is from this order that the Defendant now appeals.

ANALYSIS

On appeal, the Defendant argues that there is no substantial evidence to support the trial court's determination that he violated the conditions of his community corrections sentence by possessing cocaine. The Defendant points to the facts that Officer Love did not testify as to what kind of pills were in the vehicle and that no scientific or other analysis was introduced regarding the pills or any "white powder" or "rock" substance. The State concedes that the trial court erred in revoking the Defendant's community corrections sentence.[3]

The trial court has the discretion to revoke a community corrections sentence upon a finding that a defendant has violated the conditions of the agreement. Tenn. Code Ann. § 40-36-106(e)(4); State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). The court may then resentence a defendant to any appropriate sentencing alternative, including incarceration, for any period of time up to the maximum provided for the offense committed, less any time actually served in any community-based alternative to incarceration. Tenn. Code Ann. § 40-36-106(e)(4); State v. Samuels, 44 S.W.3d 489, 493 (Tenn. 2001).

The proof of a community corrections violation need not be established beyond a reasonable doubt; it is sufficient if it allows the trial court to make a conscientious and intelligent judgment. Harkins, 811 S.W.2d at 82-83. When revoking a community corrections sentence, the trial court

[3] Because the State concedes error on the ultimate merits of the issue, and because of the sparse record presented on appeal, we decline to address any potential procedural error in this case.

must place its findings of fact and the reasons for the revocation on the record. Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973).

The Tennessee Supreme Court has held that an abuse of discretion standard of appellate review should be used to address the revocation of a community corrections sentence. Harkins, 811 S.W.2d at 82-83. Before a reviewing court is warranted in finding an abuse of discretion in a community corrections revocation, it must be established that the record contains no substantial evidence to support the conclusion of the trial court that a defendant violated the terms of the community corrections program. Id.

We must agree that the record contains no substantial evidence to support the trial court's decision to revoke the Defendant's community corrections sentence. The only evidence prevented at the motion to suppress hearing which indicated that the Defendant possessed illegal drugs was Officer Love's testimony (1) that Officer Robarge observed a white powder or rock-like substance in the backseat of the Defendant's vehicle and (2) that, upon a search of the Defendant's vehicle, he discovered "pills . . . in a cellophane wrapper like used for cigarette packs." This testimony alone is not sufficient to establish that the Defendant possessed cocaine or illegal narcotics. Even if the trial court accredited Officer Love's testimony, the circumstantial proof at the motion to suppress hearing was insufficient to conclude by a preponderance of the evidence that the Defendant possessed illegal drugs in violation of his community corrections sentence.

CONCLUSION

The order of the trial court revoking the Defendant's community corrections sentence is reversed. This case is remanded for further proceedings consistent with this opinion.

_____

DAVID H. WELLES, JUDGE